Supreme Court, U.S.
FILED

96 394 AUG 2 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ROGER PICKETT,

Petitioner,

vs.

THE CITY OF WARR ACRES, KEITH GREENWOOD, BOB CUNNINGHAM, JOHN HENSLEY, AND JEFF PARSONS,

Respondents.

Petition For Writ Of Certiorari From The Supreme Court Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

MARK HAMMON
401 N. Hudson, Lower Level
Oklahoma City, OK 73102
(405) 235-6100 (Fax 235-6111)

and

KEVIN L. MCCLURE
(Application Pending)
3030 N.W. Expressway, Suite 460
Oklahoma City, OK 73112
(405) 948-6526 (Fax 949-0849)
Attorneys for Petitioner

August 2, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether summary judgment was properly granted in a civil rights case to a police officer (defendant) acting under color of government authority responding to a 911 call at a doctor's (plaintiff) office, who interfered with the proper treatment of a patient by his doctor by physically restraining and injuring the doctor who was administering CPR to his patient who had a heart attack in his office?

2. Whether summary judgment was appropriately granted in a civil rights case to several firemen (defendants) who responded to a 911 call at a doctor's (plaintiff) office and who violated the doctor's constitutional rights not to be slandered and not to have his private practice interfered with by government employees acting under color of government authority, while the doctor was administering CPR to his patient who had a heart attack in his office?

3. Whether summary judgment was properly granted to the City of Warr Acres (defendant) in a Civil Rights case where its police officer and firemen acting under color of government authority responding to a 911 call at a doctor's (plaintiff) office interfered with the doctor-patient treatment and its police officer physically removed the doctor from his patient while he was administrating CPR and then restrained and injured the doctor with the approval of the City administration?

LIST OF PARTIES

The caption contains all of the parties to the proceedings before the Oklahoma Supreme Court, Oklahoma Court of Appeals, and the District Court for Oklahoma County, State of Oklahoma.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Statutes and Constitutional Provisions 2

Concise Statement of the Case 2

Argument for Allowance of the Writ of Certiorari .. 4

TABLE OF AUTHORITIES

Page

CASES CITED:

SUPREME COURT

Allgeyer v. Louisiana, 165 U.S. 578, 41 L.Ed. 832, 17 S.Ct. 427 (1897).....4, 5

Anderson v. Creighton, 107 S.Ct. 3034 (1987).....6

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....6

Keker v. Procunier, 398 F.Supp. 756 (1975).....5

Meredith v. Arizona, 523 F.2d 481 (1975).....5

O'Conner v. Donaldson, 422 U.S. 563 (1975).....6

Scheuer v. Rhodes, 416 U.S. 232 (1974).....6

Woods v. Strickland, 420 U.S. 308 (1975).....6

CIRCUIT COURT

Brandenburg v. Cureton, 882 F.2d 211 (6th Cir. 1989)...7, 8

Bryan v. Jones, 530 F.2d 1210, cert. denied, 429 U.S. 865 (1976).....6

Ford v. Wells, 347 F.Supp. 1026 (1972).....4, 6

Hansen v. Black, 885 F.2d 642 (9th Cir. 1989).....7, 8

Jackson v. Hoylman, 933 F.2d 401 (6th Cir. 1991).....7

Mansell v. Saunders, 372 F.2d 573 (1967).....4, 5

McDowell v. Rogers, 863 F.2d 1302 (6th Cir. 1988)...7, 8

Moore v. Morgan, 922 F.2d 1553 (11th Cir. 1991).....7, 8

Universal Amusement Co. v. Hofheinz, 646 F.2d 44 (5th Cir. 1978).....7, 8

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

42 U.S.C. Section 1983 ..... 1, 2, 5

PETITION FOR WRIT OF CERTIORARI

Petitioner Roger Pickett respectfully prays that a Writ of Certiorari be issued to review the May 6, 1996, Order and Judgment of the Supreme Court of Oklahoma.

OPINIONS BELOW

The Order denying Certiorari to the Oklahoma Supreme Court entered on May 6, 1996, is reprinted as Appendix "A" hereto.

The Order of the Court of Appeals for the State of Oklahoma opinion ruled on Nov. 14, 1995, denying Plaintiff's appeal reprinted as Appendix "B" hereto. There is no official citation for the Court's Order.

The Order of the District Court for Oklahoma County, State of Oklahoma, rendered on Oct. 26, 1994 granting Defendant's request for summary judgment is reprinted as Appendix "C" hereto. There is no official citation for the District Court Order.

The Order of the Supreme Court for the State of Oklahoma was entered on May 6, 1996. No Petition for Rehearing was filed. This Petition for Writ of Certiorari was filed within ninety (90) days of the Order and Judgment of the Supreme Court of Oklahoma pursuant to Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. §§ 2101 and 1254. The original action filed in the District Court for Oklahoma County, State of Oklahoma, was for civil rights

violations under the United States Constitution and § 1983 civil rights act.

JURISDICTION

Jurisdiction was vested in the district court pursuant to the Oklahoma political subdivision torts claims act (state related claims) and federal civil rights act § 1983 played for in the original Petition. The judgment entered disposed of the entire action wherefore the order was final and appealable of right pursuant to the State rules of civil procedure. All State appeals were perfected in accordance with Oklahoma's Rules of Appellate Procedure and the Rules of the Supreme Court of Oklahoma.

THE FOLLOWING STATUTES AND CONSTITUTIONAL PROVISIONS ARE AT ISSUE IN THIS APPEAL:

42 USC Section 1983

Fifth Amendment, U.S. Constitution

Fourteenth Amendment, U.S. Constitution

CONCISE STATEMENT OF THE FACTS

Dr. Roger Pickett, M.D. (and the independent witnesses who were in the doctor's office at the time) assert that on or about August 27, 1991, a patient (Mr. Kimbro) arrived at the doctor's pain clinic. (Dr. Pickett is a medical doctor with a specialty in anesthesiology). While waiting to see the doctor Mr. Kimbro suffered a heart attack.

The doctor was called for assistance while his receptionist called for an ambulance. The doctor started CPR and breathing for his patient; five to ten minutes later the police and firemen (defendants) arrived and started to set up for defibrillation. When they were set up one of the firemen gave the all clear command, the doctor raised off his patient moved a safe distance away and waited for the shock. Having worked with this type of equipment before, the doctor knew he was far enough away and told the firemen to shock his patient because they were wasting valuable time. Without provocation or threat to anyone, the police officer grabbed the doctor from behind restraining him and pulled him away from his dying patient (in the process injuring the doctor). The police officer would not release the doctor despite the doctor's efforts of telling the officer that it was his patient and that he was in charge of his treatment.

Defendants (unsupported by independent witness statements) assert basically the same thing, except they alleged that the doctor was performing CPR improperly and without breathing for his patient (obviously untrue since the doctor saved his patient's life with the CPR). That when the "clear" command was given the doctor would not clear and was still touching his patient, and that when asked again to "clear" he swung at one of the firemen (these allegations are totally unsupported by the independent witnesses and only the defendants allege these facts occurred). In a police incident report (freely available to the public) one of the firemen called the doctor a "violent quack". Later a City official praised the firemen and the police officer in a local newspaper, asserting that their employees did nothing wrong and

were in charge of the situation. The independent witnesses on the scene of this incident likened the police officer's conduct to a form of police brutality.

Dr. Pickett filed his Petition in State District Court asserting several state claims and violation of his U.S. Constitutional Rights, asserting violations of Section 1983 Civil Rights Act.

ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

This Court should allow certiorari in this case because issues of freedom from governmental interference and assault that threaten the health and safety of the citizens of this country are at issue. While Dr. Pickett acknowledges the importance of emergency personnel, without clear and precise guidelines from which to follow, they appear to believe that any behavior (regardless of its consequences) is all right because they are immune from legal action by asserting that they were acting under an emergency situation. (Which plaintiff's believe a factual dispute for a jury to decide).

The Constitutional Rights, Dr. Pickett asserts were violated by the Defendants in this case are [1] a liberty interest for Freedom of Enterprise (see *Allgeyer v. Louisiana*, 165 U.S. 578, 41 L.Ed. 832, 17 S.Ct. 427 (1897) and *Mansell v. Saunders*, 372 F.2d 573 (1967)), [2] a liberty interest in freedom from Assault and Bodily Injury (Fifth and Fourteenth Amendments), and [3] a liberty interest in freedom from false imprisonment (see *Ford v. Wells*, 347 F.Supp. 1026 (1972)).

[1] Freedom of Enterprise is a constitutional right protected under the "liberty" concept of both the Fifth and Fourteenth Amendment (*Allgeyer v. Louisiana*, 165 U.S. 578, 41 L.Ed. 832, 17 S.Ct. 427 (1897)), and a Section 1983 action lies against persons acting under "color of law" who unlawfully deny the right. (*Mansell v. Saunders*, 372 F.2d 573 (1967)). Section 1983 actions are generally available against governmental controls upon enterprises that are either arbitrary or unreasonably discriminatory. *Mansell v. Saunders*, 372 F.2d 573 (1967). Protectable under section 1983 is the right of a lawyer or medical doctor to practice his profession free from arbitrary or unreasonable restraint by governmental agencies. *Keker v. Procunier*, 398 F.Supp. 756 (1975).

In this case it is clear that the City of Warr Acres and its employees carried out a policy (approved by the City's Attorney) of unreasonably and arbitrarily taking over a medical doctor's practice by harassing and ridiculing the plaintiff and by dragging him off a dying man he was trying to save. Such is not only immoral but contrary to the protected liberty interests a doctor has in treating his patient. Slander per se by a City Fireman in a public document calling the doctor a "violent quack", goes to the heart of the case, *i.e.*, slandering the doctor in his profession.

[2] The Freedom from Assault and Bodily Injury is a constitutionally protected right under the Fifth and Fourteenth Amendments, and actionable under section 1983. *Meredith v. Arizona*, 523 F.2d 481 (1975).

In our case, the unprovoked, unlawful, and uncalled for assault and bodily injury of Dr. Pickett by the Warr

Acres Police Officer who was acting under color of his City's authority is a denial of plaintiff's liberty interest. The immorality of pulling a doctor off his dying patient shocks the conscience of anyone who hears it. The doctor suffered bruised arms and was restrained without just cause from treating his dying patient.

[3] The Freedom from False Imprisonment is secured under the U.S. Constitution. (See *Ford v. Wells,* 347 F.Supp. 1026 (1972)). In a section 1983 action based upon false imprisonment, the Fifth Circuit Court of Appeals in *Bryan v. Jones,* 530 F.2d 1210, cert. denied, 429 U.S. 865 (1976), held that a prima facia case is made when the plaintiff shows confinement and awareness by the plaintiff plus an intent of the defendant to confine.

In the case at bar, Defendant Greenwood unreasonably confined and restrained Dr. Pickett from assisting in the resuscitation of his patient. Such immoral and unreasonable conduct (which Dr. Pickett was definitely aware of) is unconstitutional.

As for the defendant's assertion of immunity, the basic Supreme Court cases of the qualified immunity defense are *Scheuer v. Rhodes,* 416 U.S. 232 (1974); *Woods v. Strickland,* 420 U.S. 308, 322 (1975); *O'Conner v. Donaldson,* 422 U.S. 563 (1975); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 107 S.Ct. 3034 (1987). Their basic rulings state that a government official is not immune from liability "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff." *Woods v. Strickland,* 420 U.S. 308, 327 (1975). Furthermore, suits against a governmental

official in his official capacity is to be treated as a suit against the governmental entity they represent, and therefore, no good faith defense is possible. *Universal Amusement Co. v. Hofheinz*, 646 F.2d 44 (5th Cir. 1978); *Moore v. Morgan*, 922 F.2d 1553 (11th Cir. 1991) (official capacity suit; governmental entity not entitled to qualified immunity).

It is clear that the defendants cannot escape this lawsuit for their actions since they have been sued in both their official and individual capacity. (See Petition). As for the qualified immunity defense for liability of the defendants' acting in their individual capacity, a great deal of case law exits on the subject. Because an excessive force claim and the defense of qualified immunity are generally fact-bound, resolution by summary judgment is often impossible. See, e.g., *Jackson v. Hoylman*, 933 F.2d 401, 403 (6th Cir. 1991); *Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989) ("the legal question of immunity [for this fourth amendment claim] is completely dependent upon which view of the facts is accepted by the jury"); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989) (whether bruises and pain were caused by unreasonable force is a question for the jury); *McDowell v. Rogers*, 863 F.2d 1302 (6th Cir. 1988) (excessive force is a question for the jury)).

As for the qualified immunity as it applies to the firemen defendants in this case, defendants claim that this immunity (if accepted by the Court) prohibits plaintiff from further pursuing action against them. It is clear that when a governmental official is sued in both their official and individual capacities (as has been done in this case), the qualified immunity will only act as a shield to

protect them individually. They must remain a part of the lawsuit in their official capacity. *Universal Amusement Co. v. Hofheinz*, 646 F.2d 44 (5th Cir. 1978); *Moore v. Morgan*, 922 F.2d 1553 (11th Cir. 1991) (official capacity suit; governmental entity not entitled to qualified immunity).

As for the defendants' claim that they should be shielded from liability in their individual capacity through the claim of qualified immunity, such is not allowed when there are fact questions to be resolved. *Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989) ("the legal question of immunity [for this fourth amendment claim] is completely dependent upon which view of the facts is accepted by the jury"). Therefore, since there remains a dispute as to what was exactly done and said according to the defendants' version of what happened and the independent witnesses' version of what happened, summary judgment was inappropriate.

Turning to Greenwood (police officer/defendant), it is clear that a question of excessive force remains at issue in this case. (The independent witness in this case likens the officer's conduct as a form of police brutality). As such, summary judgment was again inappropriate because such question is best left to a jury. *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989) (whether bruises and pain were caused by unreasonable force is a question for the jury); *McDowell v. Rogers*, 863 F.2d 1302 (6th Cir. 1988) (excessive force is a question for the jury).

It is from this holding that, Petitioner seeks review by this Court.

Respectfully submitted this 2nd day of August, 1996.

MARK HAMMONS
and
KEVIN L. MCCLURE
Attorneys for Petitioner

APPENDIX

APPENDIX

Page

A. Order and Judgment of the Oklahoma Supreme Court denying Certiorari.....App. 1

B. Order and Opinion of the Court of Appeals for the State of Oklahoma upholding the District Court's ruling granting all Defendants Summary Judgment.....App. 3

C. Judgment of the District Court State of Oklahoma granting all Defendants Summary Judgment.....App. 11

APPENDIX
A

Oklahoma Supreme Court Order
Denying Certiorari

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

ROGER PICKETT, Appellant, vs. THE CITY OF WARR ACRES, KEITH GREENWOOD, BOB CUNNINGHAM, JOHN HENSLEY and JEFF PARSONS, Appellees.	)	No. 84,525

ORDER

(Filed May 6, 1996)

Upon consideration of the petition for certiorari in the above styled and numbered cause, THIS COURT FINDS:

1. Certiorari should be denied.

2. The opinion of the Court of Appeals should be withdrawn from publication. Rules of Appellate Procedure in Civil Cases, 12 O.S.1991, ch. 15, App. 2, Rule 1.200(C)(B).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the petition for certiorari is denied and that the opinion of the Court of Appeals be withdrawn from publication.

DONE IN CONFERENCE this 6th day of May , 1996.

/s/ Illegible Wilson
CHIEF JUSTICE

VOTE TO DENY CERTIORARI:

KAUGER, V.C.J., HODGES, LAVENDER, SUMMERS, WATT, JJ., concur.

WILSON, C.J., SIMMS, HARGRAVE, JJ., dissent.

VOTE TO WITHDRAW PUBLICATION OF THE OPINION OF COURT OF APPEALS:

WILSON, C.J., LAVENDER, SIMMS, HARGRAVE, SUMMERS, WATT, concur.

KAUGER, V.C.J., HODGES, J., dissent.

APPENDIX
B

Oklahoma Court Of Appeals
Opinion and Order

RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF APPEALS

IN THE COURT OF APPEALS, DIVISION 2

STATE OF OKLAHOMA

ROGER PICKETT, Appellant, vs. THE CITY OF WARR ACRES, KEITH GREENWOOD, BOB CUNNINGHAM, JOHN HENSLEY and JEFF PARSONS, Appellees.	)	No. 84,525 (Filed Nov. 14, 1995)

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

Honorable Leamon Freeman, Trial Judge

Doctor brought action against the City of Warr Acres, three firefighters and a policeman for defamation and violation of his civil and personal rights. Trial court granted summary judgment in favor of the city and its employees. Doctor appeals.

AFFIRMED

Kevin L. McClure
Oklahoma City, Oklahoma — For Appellant

Brently C. Olsson
Kent Fleming
Huckaby, Fleming, Frailey, Chaffin,
Cordell, Greenwood & Perryman
Oklahoma City, Oklahoma — For Appellees

REIF, J.

Plaintiff-doctor appeals the summary judgment that denied recovery from the city and four city employees for alleged violations of his personal and civil rights by the city employees while responding to a medical emergency at doctor's medical clinic. The crux of doctor's position is that the city employees – a police officer and three firefighter/emergency medical technicians – physically interfered with and usurped the medical treatment he was rendering to a patient who had suffered a heart attack in the waiting room of his clinic. He also contends that the city employees defamed him by statements they made both at the scene and in reports they later made concerning the incident. Doctor believes there are material factual controversies that preclude summary judgment.

Most of the background facts are not in dispute and are as follows. An individual who was waiting to see doctor for the first time suffered a heart attack. Doctor commenced CPR and his secretary called "911" for an ambulance. The police officer and firefighter/EMTs responded to the "911" call. Upon arrival, the firefighter/EMTs administered oxygen and proceeded to employ a

defibrillator in order to administer an electrical shock to revive the heart attack victim. Doctor did not object to the administration of oxygen, the use of the defibrillator, or its operation by a firefighter/EMT. However, at the moment when the firefighter/EMT was to administer the electric shock, a dispute developed between doctor and the firefighter/EMT who was operating the defibrillator. The operator asked doctor to move back and doctor contends that he moved to what he thought was a sufficiently safe distance. The operator disagreed that the doctor was far enough back and again told doctor to move back. Doctor admits that he refused the operator's direction to move farther away, and explained this action by telling the operator (for the first time) that he was a doctor, that he was familiar with such equipment, that he knew what he was doing, and that he believed he was far enough back. Doctor also directed the operator to administer the defibrillator shock. One of the firefighter/EMTs remarked that doctor obviously did not know what he was doing or he would move farther back. At this point, the police officer interceded and physically moved the doctor farther away. Doctor become upset by this action and struggled to resist. The officer restrained him until he calmed down. Upon being released from restraint, doctor returned to attending the heart attack victim who was ultimately revived by the defibrillator treatment and eventually transported by ambulance to a hospital.

There is no controversy that administration of a defibrillator shock poses a danger of "arcing" to persons who are in close proximity to a heart attack victim at the time the shock is administered. The safe distance necessary to

protect persons nearby, including doctor, was not a medical textbook question, but a judgment call that rested with the person responsible for operating the defibrillator. Doctor's desire to remain close at hand out of concern for the patient did not outweigh the danger that the defibrillator operator sought to avoid by directing him to move farther away. The police officer's decision to physically move doctor was clearly aimed at protecting doctor and ending the delay in administering life-saving defibrillation.

The doctrine of privilege is discussed at 6 Am. Jur. 2d *Assault and Battery* § 147 (1963). This section states that a privilege may be based, inter alia, on the fact that its exercise is necessary to protect some interest of the public which is of such importance as to justify the harm caused, or the fact that the actor is performing a function for the proper performance of which freedom of action is essential. This section notes that "an act done without the consent of the person affected which constitutes assault and battery . . . may be justified by the fact that the performance of the act was done in a situation of emergency urgently calling for the act . . . or to prevent serious harm" This rule is also expressed in Restatement (Second) of Torts § 10 (1965).

There is a specific application of privilege in Restatement (Second) of Torts § 156 (1965), that provides:

> One who is under a duty to protect a third person . . . against harm from the misconduct of another is privileged to use such force against or to impose such restraint upon the other as is
>
> (a) reasonable in view of the threatened harm, and

(b) reasonably necessary for the performance of his duty.

This rule was followed in *Furrh v. Arizona Bd. of Regents*, 676 P.2d 1141, 1146 (Ariz. Ct. App. 1983). This case also observes that "[i]ntentional acts done out of necessity to prevent harm to one or more persons are not actionable so long as they are reasonable."

We believe that the foregoing are properly employed to construe the statutory privilege to use force found in 21 O.S.1991 § 643(1). This provision provides in pertinent part that "[t]o use . . . force . . . upon or toward the person of another is not unlawful . . . [w]hen necessarily committed by a public officer in the performance of any legal duty, or by any other person assisting him or acting by his direction."

Public safety and emergency services personnel should not be held to perfect judgment in making split second decisions in emergency and life-threatening situations. The very nature of an emergency or life-threatening situation demands that they act, and often react, quickly and decisively. The fact that it may later appear that there may have been a better way to respond to a particular exigency should not be the yardstick to measure the propriety of their actions and decisions in address urgent needs as they are encountered in the heat of the moment.

The appropriate standard by which to judge the actions or decisions of public safety and emergency services personnel is to assess the objective reasonableness and necessity of the action or decision in the context of

the emergency or life-threatening situation. This promotes competency on the part of the personnel and provides appropriate accountability without "chilling" their willingness to act quickly and decisively. A lesser or more liberal rule would invite recklessness, but a more strict rule of hindsight would make the personnel unduly hesitant and reflective when facing an urgent need to act.

Regardless of the superior medical knowledge doctor may possessor his reasons for not agreeing with the operator's judgment, the operator acted in an objectively reasonable and prudent manner in directing doctor to move farther away and in not administering the potentially dangerous shock until he believed it was safe to do so. The firefighter/EMTs were ultimately responsible for the safe and proper administration of the defibrillator portion of the life-saving treatment and efforts. As such, they were not required to accept doctor's directions or assistance concerning that phase of the treatment, and doctor had no privilege to interfere with or take control of such treatment from those with ultimate responsibility. *See City of Columbua v. Nickles,* 504 N.E.2d 1204, 1207 (Ohio Ct. App. 1986). For the police officer to intercede and enforce compliance with the operator's direction to move farther away was also objectively reasonable and prudent in the face of precious lifesaving seconds being wasted by the distance dispute. The actions of the firefighter/EMTs and police officer on the scene of the emergency in regard to administering the defibrillation were "privilege" and "not actionable" either as torts or violations of doctor's civil rights.

We similarly conclude that the alleged defamatory statements by the officer and firefighter/EMTs are

shielded by a privilege. By statute, a privileged publication is one made "[i]n the proper discharge of an official duty." 21 O.S.1991 § 772 (Second). This privilege is an absolute privilege under Oklahoma law. *Hughes v. Bizzell*, 189 Okla. 472, 117 P.2d 763, 765 (1941); *Sanford v. Howard*, 185 Okla. 660, 95 P.2d 644, 646-47 (1930). Summary judgment is properly granted where the undisputed facts show the allegedly defamatory statements were made by a public officer while doing an act in the course of his official duties which he is directed or authorized to do. *Long v. Mertz*, 407 P.2d 404, 409-411 (Ariz. Ct. App. 1965). *See also Wolf v. Williamson*, 889 P.2d 1177 (Mont. 1995). In a well-reasoned analysis, *Long* held that the absolute privilege extended to appointed officials in the discharge of their duties and that the privilege is not lost simply because the official uses "intemperate language" in making the communication.

In the instant case, it is undisputed that all of the statements about which doctor complains were made by the police officer and firefighter/EMTs in the proper discharge of their official duties of (1) responding to the life and death medical emergency and (2) making official reports concerning the medical emergency.[1] As such, they

---

[1] Doctor complains about the opinion/observations of the police officer and/or firefighter/EMTs that characterized doctor's CPR method as "wrong" and "poorly," and described him as "violent," "scared," "not acting professionally," not knowing what he was doing, and "[a] quack who . . . gave no assistance whatsoever." The belief by these emergency services personnel that the CPR had been administered "wrong[ly]" or "poorly" explains the urgency for the administration of defibrillation and explains why they questioned doctor's

were entitled to summary judgment by virtue of statutory privilege.

For the reasons set forth, the summary judgment is AFFIRMED.

TAYLOR, P.J., and BOUDREAU, J., concur.

November 14, 1995

---

judgment on the issue of whether he was far enough away for defibrillation. The descriptions of doctor as "violent," and "scared" are matters of common observation and fair comment on the behavior and demeanor that doctor manifested during his resistance to the officer and explain the need for the officer's restraint. The references doctor as "not acting professionally," not knowing what he was doing, and "[a] quack who . . . gave no assistance whatsoever," explain why the firefighter/EMTs did not follow his directions concerning operation of the defibrillator. In brief, they all relate to the emergency that they were dealing with and explain why they acted the way they did.

APPENDIX
C

District Court for Oklahoma County
State of Oklahoma
Judgment
(No opinion or findings of fact were given)

IN THE DISTRICT COURT FOR
OKLAHOMA COUNTY
STATE OF OKLAHOMA

ROGER PICKETT, Plaintiff,	)	Case No. J-92-884
vs.	)	
The CITY OF WARR ACRES, KEITH GREENWOOD, BOB CUNNINGHAM, JOHN HENSLEY and JEFF PARSONS, Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

(Filed Oct. 26, 1994)

NOW ON this 16th day of July 1993, the above styled and numbered case comes before the Court upon Defendants, City of Warr Acres, Keith Greenwood, Bob Cunningham, John Hensley and Jeff Parsons' Motion for Summary Judgment. The Court upon review of the Briefs submitted from all parties, does find that there is no genuine issue of material fact and Defendants, City of Warr Acres, Keith Greenwood, Bob Cunningham, John Hensley and Jeff Parsons are entitled to judgment as a matter of law.

THEREFORE IT IS ORDERED, ADJUDGED, and DECREED that judgment is entered this 26 day of October,1994, against the plaintiff and in favor of all the defendants. IT IS SO ORDERED.

/s/ Leamon Freeman
DISTRICT JUDGE
LEAMON FREEMAN

(2)

Supreme Court, U.S.
FILED
OCT 9 1996
CLERK

No. 96-394

In The

Supreme Court of the United States

October Term, 1996

ROGER PICKETT,

Petitioner,

vs.

THE CITY OF WARR ACRES, KEITH GREENWOOD, BOB CUNNINGHAM, JOHN HENSLEY, AND JEFF PARSONS,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Supreme Court

RESPONDENTS' OBJECTION TO PETITION FOR WRIT OF CERTIORARI

HUCKABY, FLEMING, FRAILEY, CHAFFIN, CORDELL, GREENWOOD & PERRYMAN

KENT FLEMING, OBA# 2976
BRENTLY C. OLSSON, OBA# 12807
1215 Classen Drive
P. O. Box 60130
Oklahoma City, OK 73146
(405) 235-6648

Attorneys for Respondents

October 9, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1+1 pp

LIST OF PARTIES

The caption contains all of the parties to the proceedings before the Oklahoma Supreme Court, Oklahoma Court of Appeals and the District Court for Oklahoma County, State of Oklahoma.

TABLE OF CONTENTS

Page

Table of Authorities iii

Concise Statement of the Case 1

Summary of Legal Arguments 3

Legal Arguments and Authority in Objection to the Writ for Certiorari 4

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES CITED:

Supreme Court

General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1938) 4

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) 7, 8

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) 6

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1151, 47 L.Ed.2d 405 (1976) 5

Penbaur v. City of St. Louis, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) 5

Pratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1980) 5

Circuit Court

Alan v. Denver Public School Bd., 928 F.2d 978 (10th Cir. 1991) 6

Conaway v. Smith, 853 F.2d 789 (10th Cir. 1984) 6

Garinois v. Newton, 827 F.2d 306 (10th Cir. 1987) 7

Karr v. Smith, 774 F.2d 1029 (5th Cir. 1991) 7

Sullivan v. Stark, 808 F.2d 737 (10th Cir. 1987) 6

TABLE OF AUTHORITIES – Continued

Page

Summers v. State of Utah, 927 F.2d 1165 (10th Cir. 1991) 7

Thompson v. City of Lawrence, 58 F.3d 1511 (10th Cir. 1995) 7, 8

OTHER AUTHORITIES:

Title 12 O.S. §196 8

Title 21 O.S. §540 8

Title 21 O.S. §650.4 8

CONCISE STATEMENT OF THE CASE

On the afternoon of August 27, 1991, J.C. Kimbro came to the "Stress Clinic" to be treated by Petitioner Dr. Roger Pickett for pain management. While Mr. Kimbro was seated in the waiting room, he passed out and became unconscious. The secretary for the Petitioner, at the doctor's behest, made a "911" call. In response, Respondent City of Warr Acres dispatched an "EMT" (Emergency Medical Technician) team made up of firemen to the Stress Clinic. The respondent firemen who were dispatched were Bob Cunningham, John Hensley and Jeff Parsons. When they arrived, they observed a man dressed in a white button-down shirt and slacks performing CPR and mouth-to-mouth resuscitation on Mr. Kimbro. The man was later learned to be the Petitioner, Roger Pickett. Police Officer Keith Greenwood also accompanied the team.

The firemen/EMTs proceeded to hook up a defibrillator to Mr. Kimbro. EMT David Bryant told Petitioner Pickett to cease performing CPR and to "back away" from the heart attack victim. As the Oklahoma Court of Appeals (attached as Appendix "B" to the Petition for Writ of Certiorari) observed, there was no controversy that a defibrillator shock posed a danger of arcing to persons in close proximity to a heart attack victim at the time the shock was administered. There was no dispute that the person operating the defibrillator had the discretion to direct how far back people working around the patient should be.

The Petitioner Pickett did not move, and insisted that he was far enough back from the heart attack victim.

Upon being asked to move again, the Petitioner responded angrily and did not move. The testimony from the firemen indicated that the Petitioner reacted by hitting EMT, David Bryan.

Oklahoma law makes it a misdemeanor offense for anyone without justifiable excuse or cause to commit an assault or battery upon an emergency medical technician. Officer Greenwood, believing that a misdemeanor had been committed in his presence by the Petitioner doctor and to protect the Petitioner from the danger of an electric arc thus ending the delay in administering the life saving defibrillation, grabbed the Petitioner and had to subdue him. The Petitioner was upset by this action and struggled to resist Officer Greenwood's hold. The officer restrained the Petitioner until he calmed down. Upon being released from the officer's grasp, the doctor did return to attending the heart attack victim, who was ultimately revived by the defibrillator treatment and eventually transported by the ambulance to the hospital.

In the official police report concerning the actions of the Petitioner, one of the firemen gave an opinion that the Petitioner became a "violent quack." Petitioner said in his deposition that his medical practice was not effected by this incident or the "quack" opinion.

The trial court, the Oklahoma Court of Appeals and the Oklahoma Supreme Court, after reviewing the record submitted, found there was no dispute of material facts and the Respondents were entitled to summary judgment on all claims, including the Petitioner's constitutional claims.

SUMMARY OF LEGAL ARGUMENT

A review of the Petitioner's Petition for Writ of Certiorari reveals the alleged error is that the Oklahoma Supreme Court erroneously found that the facts submitted in the record were not in dispute and misapplied the properly stated rules of law. According to Rule 10(c) of the Rules of the Supreme Court of the United States, such contentions do not merit granting the Petition for Certiorari. The undisputed facts demonstrated that no final policymaker or policy of the City of the Warr Acres was the moving force behind the alleged constitutional deprivation alleged by Petitioner. Petitioner presented no evidence in the record that his business was harmed as a result of the incident in question, thus no liberty deprivation occurred. Finally, the record clearly demonstrated that the firemen and the police acted with objective reasonableness and had probable cause to restrain Petitioner when he refused to move away from the heart attack victim. The Petitioner's arguments baldly conclude that there was disputed material facts in the record. The essence of Petitioner's argument is, in reality, mere disagreement of the law to the undisputed facts. However, three courts determined the record to be of sufficient clarity that the facts were not in dispute as to what occurred and the Respondents were entitled to summary judgment.

LEGAL ARGUMENTS AND AUTHORITY IN OBJECTION TO WRIT OF CERTIORARI

PROPOSITON I

CERTIORARI IS NOT APPROPRIATE TO REVIEW EVIDENCE OR INFERENCES DRAWN FROM IT.

Rule 10(c) states in relevant part: "A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law." The United States Supreme Court articulated in *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1938) the longstanding rule that it will not grant certiorari merely to review evidence or inferences drawn from it. The substance of the instant Petition for Certiorari falls precisely within the criteria that this Court will not consider on certiorari. The Petitioner has listed three questions presented for review and all three begin with the following: "Whether summary judgment was properly granted . . . ?" In none of the questions presented for review does Petitioner state that the wrong law was applied to this case. When the Petitioner's argument is stripped to its bare essence, it is one of mere disagreement of the application of the law to the undisputed facts. This does not entitle Petitioner to Certiorari.

PROPOSITION II

PETITIONER PRESENTED NO EVIDENCE THAT FINAL POLICY-MAKERS FOR THE CITY OF WARR ACRES APPROVED OR ORDERED PETITIONER TO BE SEIZED OR OFFENDED.

Municipalities may only be liable under 42 USC §1983 for acts where the municipality itself is actually responsible. *Penbaur v. City of St. Louis,* 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). A municipality's policy must be the "moving force" behind the alleged violation; mere negligence is not a basis for liability under §1983. *Pratt v. Taylor,* 451 U.S. 527, 536, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1980). Only those municipal officials which have "policy making authority" may, by their actions, subject the City to §1983 liability. *Penbaur, supra,* at 483, S.Ct. at 1300.

Nothing in the record presented demonstrated that a final policy maker for the City or its policies, were the moving force behind the alleged incident in question. Accordingly, the City of Warr Acres was entitled to judgment as a matter of law.

PROPOSITON III

RESPONDENTS VIOLATED NO CONSTITUTIONALLY PROTECTED INTEREST OF THE PETITIONER.

The critical focus of any liberty interest inquiry must be whether the plaintiff was stigmatized from: (1) the publication of false and damaging information, that not only damages the plaintiff's reputation; (2) but also caused a loss of employment opportunities. *Paul v. Davis,*

424 U.S. 693, 701, 96 S.Ct. 1151, 1160, 47 L.Ed.2d 405 (1976). Characterizations that a person performed his job poorly or is negligent does not rise to a level of a violation of a protected liberty interest. *Sullivan v. Stark*, 808 F.2d 737, 739 (10th Cir. 1987); *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1984). Stigmatization or reputational damage alone, no matter how egregious, is not sufficient to support a §1983 cause of action. *Alan v. Denver Public School Bd.*, 928 F.2d 978 (10th Cir. 1991).

The characterization in the record that Petitioner was a "violent quack" is an opinion which implies, at best, that he was negligent or acted incompetently. Additionally, the Petitioner's own deposition testimony, which was included in the record, indicated that he had no evidence that his business changed or was damaged as a result of the occurrence or the report of the occurrence. Thus, it follows there was no basis for a liberty interest deprivation claim.

PROPOSITION IV

THE FIREMEN/EMT TEAM, BOB CUNNINGHAM, JOHN HENSLEY AND JEFF PARSONS, ARE IMMUNE FROM PLAINTIFF'S SUIT.

The Petitioner never demonstrated that the firemen ever acted in bad faith while performing discretionary acts or that their conduct violated clearly established statutory or constitutional rights which a reasonable person would have known, as required in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Thus the Petitioner's contentions did not lift the firemen's qualified immunity.

PROPOSITION V

OFFICER KEITH GREENWOOD ACTED WITH PROBABLE CAUSE AND OBJECTIVE REASONABLENESS IN REMOVING THE PETITIONER AWAY FROM THE HEART ATTACK VICTIM.

Probable cause arises where the facts and circumstances within an officer's knowledge in which he has reasonable, trustworthy information that is sufficient to warn a prudent man into believing that an offense had been or is being committed. *Karr v. Smith,* 774 F.2d 1029 (5th Cir. 1985). The validity of arrest is not undermined by subsequent events of a suspect's criminal prosecution or dismissal of charges. *Summers v. State of Utah,* 927 F.2d 1165, 1166 (10th Cir. 1991). Probable cause to arrest does not depend on whether the suspect actually committed a crime. *Garinois v. Newton,* 827 F.2d 306, 309 (10th Cir. 1987).

In the excessive force context, qualified immunity standard is an objective reasonableness standard. *Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989). *Thompson v. City of Lawrence,* 58 F.3d 1511, 1516 (10th Cir. 1995). The "reasonableness" of a particular use of force must be judged from the prospective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight. *Graham, supra,* S. Ct. at 1872. A calculus of reasonableness must embody allowance for the fact that officers are often forced to make split second judgments in circumstances that are tense and uncertain and rapidly enveloping, when evaluating the amount of force that is necessary for a particular situation. It is well established that the right to arrest an individual or detain them,

carries the right to use some physical coercion. *Graham, supra; Thompson, supra.*

Pursuant to Title 12 O.S. §196, the State of Oklahoma allows a police officer to make a warrantless arrest of a person "for public offense committed or attempted in his presence." Additionally, Title 21 O.S. §540 makes it a crime for "every person who wilfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office . . . " Finally, Title 21 O.S. §650.4, makes it misdemeanor for "anyone who without justifiable or excusable cause and with the attempt to do bodily harm, commits any assault, battery or assault and battery upon the person of an emergency medical technician or other emergency medical healthcare provider." The record indicated that the EMTs, as well as Officer Greenwood, saw the Petitioner batter EMT, David Bryant.

An additional cause for Officer Greenwood's physical removal of the Petitioner was the fact that the heart attack victim would die without the lifesaving defibrillation, and the Petitioner himself could be shocked by an electric arc. These compelling facts gave Officer Greenwood the right to physically remove the Petitioner from the immediate area of the heart attack victim.

Accordingly, there was no evidence in the record to lift Officer Keith Greenwood's immunity from suit as he acted with probable cause to detain the Petitioner and to save the heart attack victim from any delay in defibrillation, additionally protecting the Petitioner from the danger from electric shock arcing from the defibrillator. The undisputed facts are abundantly clear that Greenwood

acted with objective reasonableness and thus was entitled to summary judgment.

CONCLUSION

WHEREFORE, above premises considered, the Respondents, City of Warr Acres, Officer Keith Greenwood and Firemen Bob Cunningham, John Hensley and Jeff Parsons pray the Court deny the Petitioner's Petition for Writ of certiorari.

Respectfully submitted,

HUCKABY, FLEMING, FRAILEY, CHAFFIN, CORDELL, GREENWOOD & PERRYMAN
KENT FLEMING, OBA #2976
BRENTLY C. OLSSON, OBA #12807
1215 Classen Drive
P. O. Box 60130
Oklahoma City, OK 73146
(405) 235-6648

Attorneys for Respondents